KAWALAN SEMPURNA SDN BHD

v

HI-TECH ELECTRICAL SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
DATO' ABDUL KADIR SULAIMAN J
[CIVIL APPEAL NO: R1-12-17-96]
8 AUGUST 1996

CIVIL PROCEDURE: *Appeal – Appeal to Judge-in-Chambers – Notice in Form 141 not issued – Notes of evidence and judgment or grounds of decision not available – Memorandum of appeal not filed – Whether appeal ready before Judge-in-Chambers – Whether appellant must actively procure notice in Form 141*

CIVIL PROCEDURE: *Appeal – Appeal to Judge-in-Chambers – Subordinate Courts Rules 1980, O 49 r 6 – Whether a special provision – Whether operation of O 49 rr 2, 3 and 3A of Subordinate Courts Rules 1980, and, O 55 of the Rules of the High Court 1980 taken away*

CIVIL PROCEDURE: *Appeal – Record of appeal – Contents – Subordinate Courts Rules 1980, O 49 r 6(3)(d) – 'The decision appealed from' – Whether draft judgment would suffice – Whether appeal should be struck out – Whether defect in filed record of appeal can be remedied*

This was an appeal by the appellant against the decision of the Sessions Court in allowing judgment to be entered against it under O 26A of the Subordinate Courts Rules 1980 ('the SCR'). The appellant filed its notice of appeal on 17 January 1996. The record of appeal was filed pursuant to O 49 r 6(3) of the SCR on 3 February 1996. However, the appellant was expressly informed in writing by the Sessions Court that no notice in Form 141 would be issued under O 49 r 2(4) of the SCR as the appellant's instant appeal was against an interlocutory decision and not against a decision made after a trial.

On the day of the hearing on 26 June 1996, the appellant informed the Court that no notice in Form 141 had been issued by the Sessions Court and that, following the recent decision of the Court of Appeal in *Yupaporn Seangarthit v Neil Allan Campbell Webb*, the hearing of the appeal has to be rescheduled as the certified copies of the notes of evidence and the judgment or grounds of decision as well as the memorandum of appeal were not available. At this juncture, the respondent raised the preliminary objection that: (i) the appellant had failed to file a proper record of appeal within the definition of O 49 r 6(3)(d) of the SCR in that the record of appeal filed contained only a copy of the draft judgment and not a copy of 'the decision appealed from' which had been approved by the Registrar under O 29 r 9(4) and drawn up and entered in accordance with O 29 r 10(1), (2) and (3); and (ii) the appellant

had taken advantage of the current procedural complication – brought about by the insertion of O 49 r 6 into the SCR and by the case of *Yupaporn Seangarthit v Neil Allan Campbell Webb* – and was inert in getting the Sessions Court to issue the notice in Form 141. On these two grounds, the respondent prayed for the appeal to be struck out.

Held:

[1] The appellant's instant appeal was against an interlocutory decision and not against one which was made after a trial; therefore, the appeal must be governed by the provisions of O 49 r 6 of the SCR.

[2] The first ground of the respondent's preliminary objection was prematurely raised. Upon the principle laid down in *Yupaporn Seangarthit v Neil Allan Campbell Webb*, the instant appeal was not ready to be heard by a Judge in Chambers as no notice in Form 141 was issued. As such, the defect, if any, in the contents of the record of appeal filed by the appellant can always be remedied by the appellant before the hearing of the appeal, subject to leave being granted by the Court.

[3] The appellant's notice of appeal was filed on 17 January 1996 while the record of appeal was filed on 3 February 1996; this, considered together with the Sessions Court's advice in writing that no notice in Form 141 would be issued, would suggest that the appellant could not be blamed for failing to procure the said notice from the Sessions Court.

Obiter dicta:

[1] There is, indeed, some confusion over the procedure in respect of an appeal from a decision of a subordinate Court (not being a decision made after a trial) to a Judge in Chambers.

[2] Order 55 of the Rules of the High Court 1980 ('the RHC') is the general provision governing the procedure for appeals from subordinate Courts to the High Court; it is complemented by the general provisions of O 49 rr 2, 3 and 3A of the SCR. The hearing of appeals to the High Court pursuant to these aforesaid provisions is generally before a Judge sitting in open Court. On the other hand, the hearing of appeals pursuant to the special provisions of O 49 r 6 of the SCR is before a Judge in Chambers. The only provisions in the RHC concerning the hearing of appeals before a Judge in Chambers are in respect of appeals from any judgment, order, or decision of a Registrar. Thus, if there is a conflict between the provisions of these two distinct procedures, the special provisions must prevail over the general provisions. The general provisions will be called in aid only to fill the vacuum created by the special provisions in order that both may operate harmoniously. It is, therefore, incorrect to say that as O 55 of the RHC governs appeals from the subordinate Courts, the

provisions therein must prevail over the special provisions of O 49 r 6 of the SCR. To say so would be to ignore the real intention of the legislature which, in its wisdom, had chosen to insert the special provisions of O 49 r 6 into the SCR.

[3] Order 49 r 6 of the SCR has taken away the operation of O 49 rr 2, 3 and 3A in many respects, including, expressly excluding the notes of evidence, the grounds of judgment, or any memorandum of appeal from the record of appeal.

[Respondent's preliminary objection overruled; hearing date for appeal to be fixed upon receipt of Form 141 and filing of memorandum of appeal]

Cases referred to:

Yupaporn Seangarthit v Neil Allan Campbell Webb [1996] 1 CLJ 43 ***(refd)***

Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Berhad [1996] 2 CLJ 130 ***(foll)***

Syarikat Kayu Bersatu Sdn Bhd & 2 Ors v UMW (Sarawak) Sendirian Berhad [1995] 1 CLJ 113 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O 55, 56, O 92 r 4

Subordinates Courts Rules 1980, O 26A, O 29 rr 9(4), 10(1), (2), (3), O 49 rr 1, 2(4), 3, 3A, 6(1), (3), (3)(d)

For the plaintif - Rajes Raghavji; M/s Edlin, Ghazaly & Raghavji
For the defendant - Saran Singh; M/s Saran Singh & Co

JUDGMENT

Abdul Kadir Sulaiman J:

Yet again the problem faced by the High Court on account of the incorporation of r 6 into O 49 of the Subordinates Courts Rules 1980 (the SCR) and the Court of Appeal decision in *Yupaporn Seangarthit v Neil Allan Campbell Webb* [1996] 1 CLJ 43 (*Yupaporn*). On 17 January 1996 the appellant filed a notice of appeal against the decision of the learned Sessions Judge allowing the entry of judgment against the appellant who was the defendant in the Court below under O 26A of the SCR. On 3 February 1996, the record of appeal pursuant to O 49 r 6(3) of the SCR was filed. To date the Court appealed from had not issued a notice under Form 141 pursuant to O 49 r 2(4) of the SCR. Indeed in this case the Court is told that the Court below had expressly informed the appellant in writing that as the appeal is against the decision given other than a decision made after trial, no certified copy of the notes of evidence, certified copy of the judgment or grounds of decision would be given. In other words, there would not be any notice in Form 141 forthcoming.

As the appeal is over an interlocutory decision and the record of appeal had been filed by the appellant, the Court on 17 April 1996 fixed the appeal for hearing on 26 June 1996. However, on that day the learned Counsel for the appellant informed the Court that a notice under Form 141 has not been issued by the Court below. Following the reasoning in *Yupaporn* the hearing date of the appeal had to be rescheduled for the lack of a copy of the notes of evidence, a certified copy of the judgment or the grounds of decision of the Court appealed from and the memorandum of appeal by the appellant. But before a new date was given, the learned Counsel for the respondent raised two preliminary issues. One is that the appellant had failed to file a proper record of appeal within the time allowed by O 49 r 6(3) of the SCR as the copy of the decision appealed from as contained in the record of appeal filed on 3 February 1996 is only a draft judgment and not a judgment approved by the Registrar under O 29 r 9(4) and drawn up and entered in accordance with O 29 r 10(1), (2) and (3) of the SCR as so held in *Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Berhad* [1996] 2 CLJ 130 rendering it not a decision for the purpose of O 49 r 6(3)(d) of the SCR. The learned Counsel therefore, asked for the appeal of the appellant be struck out. His next objection is that owing to the inaction of the appellant in getting the Court below to issue a notice in Form 141 after being so required by *Yupaporn* renders the appeal liable to be struck out. This is so because this is not a case where the appellant would have to wait for the said notice to be issued but a case where the attention of the Court below need to be drawn by the appellant as to the issue of the notice in the light of the letter from the Court that it would not issue one because the appeal arose out of a decision other than that after trial. By this inaction on the part of the appellant, it clearly indicates that the appellant is no longer interested in pursuing with the appeal. The appellant took the advantage of the confusion in the procedure for appeal brought about by O 49 r 6 of the SCR and *Yupaporn* by doing nothing to move the Court below to issue the said notice that the records are ready. The learned Counsel even submitted that as early as 1995, *Syarikat Kayu Bersatu Sdn. Bhd. & 2 Ors v UMW (Sarawak) Sendirian Berhad* [1995] 1 CLJ 113, a decision of the High Court, Miri which the Court of Appeal in *Yupaporn* approved indicated of the need for the notice in Form 141 and the memorandum of appeal even in appeal against the decision other than a decision after trial.

In reply, the learned Counsel for the appellant submitted that indeed there was a confusion in regard to the procedure for appeal in respect of decision other than that after trial, but he asked the Court to invoke its inherent jurisdiction pursuant to O 92 r 4 of the Rules of the High Court 1980 (the RHC) in order to prevent injustice. In the present case there is no notification issued by the Court below in Form 141. He referred to *Syarikat Kayu Bersatu Sdn Bhd, supra* particularly to p 116 where the learned Judge said:

> Thus, in the present case there is no notification issued by the Subordinate Court in Form 141 to the appellants but I do not think that the appellants are now precluded from proceeding this appeal due to their failure to file the memorandum of appeal. After all the prescribed time for filing has not even commenced as Form 141 is yet to be served on them.

The learned Counsel for the appellant however, made no reply to the submission by the Counsel for the respondent on the issue of the defective record of appeal already filed.

I will deal with the second objection of the respondent first ie in relation to the inactivity of the appellant to move the Court below to issue the notice in Form 141 in the light of the decision in *Yupaporn* when the Court below had earlier on indicated that it would not be issuing one. I must confess, there is indeed some confusion over the procedure for appeal to the Judge in Chambers from a decision of the Subordinate Courts in respect of those decision other than that after the trial. This confusion is not only confined to the parties in dispute before the Court but also to the Court both below and the High Courts. This appeal relates to in decision made at the O 26A proceedings. The proceedings is not one of a trial within the context of O 49 r 6 of the SCR as I have so found in a matter before me relating to Civil Appeal No: R2-11-62-96. Therefore, any appeal made against the decision arrived thereat must be governed by the provisions of O 49 r 6 of the SCR. Prior to *Yupaporn* it was commonly understood that the procedure in the hearing of an appeal of this nature was similar to the procedure adopted under O 56 of the RHC in respect of appeal from the Registrar to the Judge being an interlocutory appeal. The appeal in both cases is to be before the Judge in Chambers as opposed to appeal to in Judge in open Court. Therefore, it was thought that it is by way of rehearing and the Judge in Chambers would treat the matter as if it has come for hearing for the first time. The Judge will of course give the decision of the Court below its due weight but he is not bound by it. More so, when O 49 r 6(3) expressly excludes the notes of evidence, the grounds of judgment or any memorandum of appeal from being included in the record of appeal. For that reason the notice in Form 141 is not at all necessary because the whole purpose behind the issue of the notice is to inform the appellant that the certified copy of the notes of evidence, certified copy of the judgment or in the case no written judgment has been delivered, of the ground of decision. This is necessary to enable the appellant to compile the record of appeal and that a time frame is provided for the appellant to file his record of appeal required as stipulated in O 49 rr 2 and 3A of the SCR in relation to appeals from the decision made after trial. In relation to appeals governed by O 49 r 6 that procedure applicable for the appeals from the decision made after trial is not to be made applicable as it stands independently on its own footing. This is because of the opening words in O 49 r 6(1) which state that the procedure is "Notwithstanding anything contained in this Order".

This phrase "in this Order" appearing in r 6(1) must necessarily relate to O 49 itself from r 1 to r 3A which concern the hearing of the appeal by the Judge in open Court. However, *Yupaporn* in early 1996 had clarified the position but it would take sometime for everyone concerned to fully appreciate the decision brought about by *Yupaporn*. The notice of appeal in this matter before me as stated earlier, was filed on 17 January 1996 and the record of appeal was filed on 3 February 1996 and coupled with the indication by the lower Court that a notice in Form 141 would not be issued in this interlocutory appeal, in order to do justice in the matter, the appellant cannot be faulted for his inactivity in moving the Court below for such a notice.

While still on the matter of the procedure for appeals from the decision of the subordinate Courts, I peruse the decision in *Syarikat Kayu Bersatu Sdn. Bhd. supra* as it was brought out by both the learned Counsel before me and mentioned in *Yupaporn*. The learned Judge in *Syarikat Kayu Bersatu Sdn. Bhd.* was of the view that there is no legal basis to allow the provisions of the SCR to govern the proceedings in the High Court. He said so because he could not find reciprocal provisions for O 49 r 6 of the SCR in particular, under O 55 of the RHC which deals with appeals to the High Court from the subordinate Courts and statutory bodies. In the absence of the reciprocal provisions, the learned Judge formed the view as enumerated by him under items (i) to (iv) appearing at pp 115 and 116 when dealing with appeals under O 49 r 6 of the SCR. In short what the learned Judge is saying is that the SCR cannot override the provisions of RHC in the absence of express provisions to that effect. Therefore, as O 55 of the RHC deals with the appeals from the subordinate Courts to the High Court, the said O 55 controls the procedure in respect of any types of appeal whatever of a civil nature from the subordinate Court to the High Court. Hence the formulation of the four items above. But with respect to the learned Judge, he overlooked the special characteristics of O 49 r 6 of the SCR which creates a special rule in itself. The special characteristics are:

i) By taking away the operation of O 49 rr 2, 3 and 3A which govern the procedure of appeals from the decisions of the subordinate Courts to the High Court generally. This is evidenced by the use of the words "Notwithstanding anything contained in this Order" appearing at the beginning of r 6(1) thereof. The words "this Order" thereat mentioned must necessarily relates to O 49 itself.

ii) By taking away the operation of O 49 rr 2, 3 and 3A. This is evidenced by the choice of forum for the hearing of the appeal. The hearing of an appeal under O 49 r 6 is to be before a Judge in Chambers. See r 6(1) again. Generally, an appeal is to be heard by a Judge in open Court.

iii) by taking away the operation of O 49 rr 2, 3 and 3A. This is evidenced by the nature of the decisions of the Court appealed from giving the

jurisdiction to the High Court to hear such appeal. Generally, an appeal is against whatever "decision" which includes "judgment", "order" and "decree" as so defined in O 49 r 1. But the jurisdiction given to the Judge in Chambers by r 6 is only in respect of "any decision made by the Court other then a decision made after trial" which phrase is used in r 6(1).

iv) by taking away the operation of O 49 rr 2, 3 and 3A This is evidenced by the different registry receiving the notice of appeal. By the operation of O 49 r 2(1) generally, the notice of appeal is to be addressed and filed with the Registrar of the Sessions Court concerned or with the Magistrate concerned. See the registry address provided in Form 140 and such registry having endorsed on a copy of the said notice of appeal with the date filed is required by r 2(1) to send it to the Registrar of the High Court for further action by the High Court in relation to the appeal. However, r 6(2) requires that the notice of appeal be filed direct with the Registrar of the High Court without having to go through the lower Court registry. See also my decision in notice of Motion relating to Civil Appeal No. R2-11-62-96. In my said decision, I have explained as to the requirement of the use of the same Form 140 in respect of both types of appeal coming from the decision of the lower Court.

v) by taking away the operation of O 49 rr 2, 3 and 3A. This is evidenced by providing different period for the filing of the record of appeal. Generally, the record of appeal shall be filed in the High Court and served on the opposite party within six weeks of the receipt of the notification in Form 141 from the Court appealed from as provided for in r 3A(3) and (4). Whereas in the case of appeal under r 6. the record of appeal is required to be filed within three weeks after the filing of the notice of appeal with the Registrar of the High Court. See r 6(3).

vi) by taking away the operation of O 49 rr 2, 3 and 3A. This is evidenced by the express exclusion of the notes of evidence, the grounds of judgment or any memorandum of appeal from the record of appeal as provided for in r 6(3).

Order 55 of the RHC is the general provision governing the appeal procedure from subordinate Courts to the High Court. This procedure is complemented by the general provisions of O 49 r 2, 3 and 3A of the SCR. The hearing of the appeals in the High Court pursuant to the two provisions respectively in RHC and SCR is by a Judge sitting in open Court. Whereas, the hearing of an appeal pursuant to O 49 r 6 is to be before the Judge in Chambers. The only provisions in the RHC concerning the hearing of appeal by the Judge in Chambers is in connection with an appeal in relation to any judgment, order or decision of the Registrar. Therefore, the hearing of all other appeals by the High Court generally is by the hearing held in open Court. The procedure for appeal under O 56 of the RHC is very much simplified. In the

circumstances, it is my view that in the event of conflict in the provisions of the two distinct procedures, the rule is that the special provisions will prevail over the general provisions when dealing with the matters governed by the special procedure. The general provisions will be called in aid only in order to fill the vacuum created by the special provisions in order for the special provisions to operate harmoniously. Therefore it is not correct to say that since O 55 of the RHC concerns appeals from subordinate Courts, the provisions therein also governs the special provisions provided by O 49 of the SCR ignoring the real intention of the legislature in its wisdom to provide certain special provisions in O 49 r 6 of the SCR. For that reason, with due respect to the learned Judge, items (iii) and (iv) as appeared in his judgment at pp 115 and 116 cannot be supported. For ease of reference I quote below the said items (iii) and (iv):

> (iii) The Court appealed from on receiving the notice of appeal should comply with O 49 r 2 and the other relevant provisions so as to enable the appeal to be brought before the High Court. This means that the necessary notice under Form 141 should be issued;
>
> (iv) the appellant must also comply with the relevant provisions under O 55 of the RHC 1980, i.e. to file the necessary memorandum of appeal. On this point the learned Counsel for the appellant highlighted the provisions of O 49 r 6. But there is a confusion I think. In the first place a memorandum of appeal should not be taken as forming part of the record of appeal - (see: *Siang Galau v. Ang Wak Hiong* [1944] 1 MLJ 42). So even though O 49 r 6 specifically excluded any memorandum of appeal I do not think that the provision should be interpreted to mean that the other provisions of O 55 of RHC 1960 should be ignored;

The learned Judge could not have overlooked the special provisions of O 49 r 6 of the SCR when he mentioned in items (ii) and (v) as follows:

> (ii) within three weeks after filing the notice of appeal the appellant shall file the record of appeal in the High Court containing the relevant documents as stated in O 49 r 6(3) of the SCR 1980 but excluding the notes of evidence, the grounds of judgment or any memorandum of appeal,
>
> (v) that the hearing is to be before a Judge in Chambers.

All my comments above in relation to the decision of the learned Judge in *Syarikat Kayu Bersatu Sdn Bhd, supra* should not be interpreted in any way as my intention to go against the principle of *stare decisis* enshrined in our judicial system in relation to the Court of Appeal decision in *Yupaporn, supra* which quoted the decision of the learned Judge. By the said principle the Court of inferior jurisdiction must accept and be bound by the decision of a superior Court as otherwise, there will be chaos in the system, each to impose its own views. The decision in the Court of Appeal in *Yupaporn* involves and applicant for leave to appeal against the decision of the High Court Judge dismissing

the applicant's appeal. In order to a mount an appeal against the said decision of the learned Judge of the High Court the appellant went to the Court of Appeal for leave. The Court of Appeal was of the view that it was not a fit case for it to give leave to appeal. Mahadev Shanker JCA at p 47 says:

> The proper application here was for extension of time (to file an appeal) and that application should have been made to the High Court.

As to the first objection by the learned Counsel for the respondent that no proper decision appealed from was included in the record of appeal of the appellant filed on 3 February 1996 as required by O 49 r 6(3)(d) of the SCR I am of the view that this preliminary objection is prematurely raised. This is so because through the guidance given by the Court of Appeal in *Yupaporn* of the need for the notice in Form 141 in appeals from any decision made by the subordinate Court other than a decision made after trial, and of the need for the memorandum of appeal in such case of appeal as well, in the absence of the notice in Form 141 in this case, this appeal by the appellant is not yet ready for the hearing by the Judge in Chambers. As such, the defect, if any, in the content of the record of appeal filed by the appellant, can always be remedied by the appellant before the hearing of the said appeal, subject of course to the leave being granted by the Court for him to do so.

In the circumstances, the two objections raised by the learned Counsel for the respondent cannot succeed. In the circumstances that this appeal is not yet ready for hearing, I take the liberty to vacate the date for the hearing of the said appeal of the respondent to a date to be fixed later when the necessary notice in Form 141 is given to the appellant and the appellant has filed the memorandum of appeal following the decision in *Yupaporn*.

The objections dismissed with no order as to costs.

Reported by Gan Peng Chiang